

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY GOSS,

Defendant-Appellant.

UNPUBLISHED

July 1, 2008

No. 277142

Wayne Circuit Court

LC No. 06-013512-01

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of and sentences for three counts of second-degree murder, MCL 750.317, and one count of second-degree fleeing and eluding, MCL 750.479a(4). We affirm.

Defendant was charged as a result of a vehicular accident that occurred after he refused to stop when a police vehicle signaled him to do so, and instead accelerated through a red light. Defendant's vehicle struck another vehicle, killing the three occupants of the vehicle.

Defendant waived his right to a preliminary examination, and was bound over to the trial court. Defendant moved to remand the matter to the district court for a preliminary examination, asserting that at the time he waived the examination he was under the influence of morphine he had received for the injuries he sustained in the accident, and was unable to make an intelligent decision regarding the waiver.

The trial court denied defendant's motion to remand for a preliminary examination, noting that at the time the waiver was made, defendant was represented by an experienced attorney,¹ and that the decision to waive a preliminary examination was a strategic one. The trial court found that no substantial evidence supported defendant's assertion that he was unable to make an intelligent decision at the time he waived his right to a preliminary examination.

¹ The attorney who filed the motion to remand and who represented defendant at trial was defendant's third appointed attorney.

The statutory sentencing guidelines, as adjusted for defendant's status as a fourth habitual offender, MCL 769.12, recommended a minimum term range of 315 to 1050 months. MCL 777.61; MCL 777.21(3)(c). The trial court sentenced defendant to three concurrent terms of 50 (600 months) to 80 years in prison for the second-degree murder convictions, and to a fourth concurrent term of six to ten years for the second-degree fleeing and eluding conviction. In imposing sentence, the trial court noted that it wished to impress upon the community that fleeing from the police was extremely dangerous and could have tragic consequences.

Defendant filed an appeal, and moved to remand this matter to the trial court for an evidentiary hearing on his assertion that counsel rendered ineffective assistance, and for a new trial or resentencing. This Court denied the motion.

The right to a preliminary examination is established by statute, and is not constitutionally based. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). If a defendant waives his right to a preliminary examination without the benefit of counsel, the trial court may, in its discretion, remand the case. MCL 767.42(1).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must also have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that the trial court deprived him of due process by denying his motion to remand the case to the district court for a preliminary examination. Defendant also contends that his original attorney rendered ineffective assistance by allowing him to waive the preliminary examination. We disagree.

Defendant's assertion that he was under the influence of morphine and other pain medication at the time he waived his right to a preliminary examination is unsubstantiated.² The trial court correctly found that no evidence supported defendant's assertion that he was unable to make a knowing and voluntary decision to waive his right to a preliminary examination. The trial court thus did not abuse its discretion by denying defendant's motion to remand the case to district court for a preliminary examination.

² Defendant's undated, unsigned, non-notarized affidavit in which he makes this assertion is invalid, *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005).

Furthermore, defendant has not specified what issues regarding his alleged use of heroin and cocaine at the time of the accident could have been fleshed out at a preliminary examination, especially given that defendant admits in his affidavit that he did not inform his attorney of his alleged use of illegal substances. Moreover, voluntary intoxication is not a defense to second-degree murder. See, *People v Langworthy*, 416 Mich 630, 652; 331 NW2d 171 (1982). Given the above, defendant has not overcome the presumption that counsel rendered effective assistance by advising him to waive the examination. *Rockey, supra* at 76.

Turning to defendant's sentencing issue, we note that under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence, and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Defendant argues that the trial court violated his right to individualized sentencing when it stated that it was imposing sentence in order to send a message to the community. We disagree.

The deterrence of others is a proper objective of sentencing. See *People v Reddish*, 181 Mich App 625, 631; 450 NW2d 16 (1989). Moreover, the trial court noted that defendant's prior record of five felony and six misdemeanor convictions warranted lengthy sentences. Finally, defendant's minimum terms were within the guidelines, and defendant does not challenge the scoring of the guidelines or the accuracy of the information on which the trial court relied when imposing sentence. Therefore, we must affirm defendant's sentences. MCL 769.34(10); *Kimble, supra* at 309.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto